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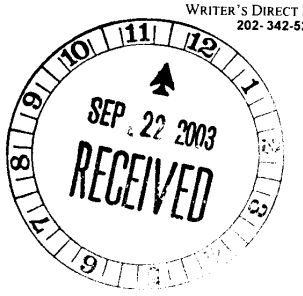

VIA HAND DELIVERY

Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

RE: Finance Docket 34192, Hi Tech Trans, LLC - - Petition for Declaratory Order - - Hudson County, NJ 208962

Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans LLC - - Petition for Declaratory Order - - Rail Transload Facility at Oak Island Yard, Newark, NJ 208968

Dear Secretary Williams:

We have received a letter dated September 16, 2003 from counsel for Hi Tech Trans LLC ("Hi Tech") (the "September 16 letter") in the above-referenced proceeding. In this letter Hi Tech has once again filed an impermissible reply to a reply. On behalf of the New Jersey Department of Environmental Protection ("NJDEP"), we respectfully request that the letter be stricken.

Hi Tech's pretext for sending the September 16 letter is that it wishes to bring the Board's attention to a recent decision issued by the Federal Court in *CFNR Operating Co., Inc. v. City of American Canyon*, 2003 WL 22078058 (ND. Cal.; Sept. 4, 2003) ("*CFNR*"). While NJDEP has no objection to Hi Tech providing copies of recent decisions, it is inappropriate and objectionable for Hi Tech to use that occasion as an opportunity to re-argue points previously made in its appeal. The text of the September 16 letter is largely cumulative, in that it again argues (incorrectly) that this new decision and *Florida East Coast Railway Co. v. City of West Palm Beach,* 266 F. 3d 1324 (11th Cir. 2001) ("*FEC*") somehow support Hi Tech's position in this proceeding. As we have been regrettably compelled to point out on two prior occasions,[1] Hi Tech has had a propensity for violating the Board's rules of practice through the submission of unauthorized replies to replies.

[1] See letters from NJDEP in this proceeding filed July 14, 2003 and August 5, 2003.

The magistrate similarly found that the trucking of goods from the rail facility also failed to fall within the scope of the preemption. In remarkably similar language, the magistrate rejected the claim of preemption:

> Taken to its logical conclusion, plaintiffs' argument would mean that any trucking company who picks up goods in a railroad terminal for delivery to a customer would be free from local regulation. Congress, however, could not have intended such an expansive interpretation of the ICCTA's reach. [Citing *FEC.*]

CFNR at 3. And, the magistrate neither discussed the issue of whether the facilities in question were designed to serve one or any particular number of customers, nor explained whether there was any significance to that distinction.

Hi Tech concludes the September 16 letter by arguing, incorrectly, that the *FEC* case affirmatively supports the proposition that its activities are somehow covered by the preemption. We have argued that Hi Tech's analysis of *FEC* is totally wrong on several occasions[2] and there is no reason to re-argue that point now. Suffice it to say that this cumulative, unauthorized submission of arguments is inappropriate, needlessly expensive to the other parties in the proceeding and should be rejected.

I am enclosing an original and 11 copies for filing and request that the additional copy be date-stamped and returned to us.

Respectfully submitted,

Edward D. Greenberg
Attorney for NJDEP

EDG
cc: Thomas J. Litwiler, Esq. via facsimile
Benjamin Clarke, Esq. via facsimile
All other parties of record via USPS

[2] See NJDEP Reply to Appeal of Hi Tech Trans LLC, filed September 4, 2003 at 7-8; and NJDEP Reply to Petitions to Intervene and Comments of Norfolk Southern Railway Co., etc., filed September 15, 2003 at 5-7.

This cavalier disregard of the rules clearly creates additional costs for the other parties, is unfair and should not be countenanced by the Board.

Moreover, Hi Tech's reliance on the *CFNR* decision is, as usual, misplaced. In the first place, the decision is issued by a magistrate and is accordingly not binding on any judge in that federal district, let alone the Board. Second, the decision specifically refused to find that the activities in issue there were integrally related to rail transportation and therefore is exactly contrary to Hi Tech's position before the Board. Third, Hi Tech's statement that the magistrate "apparently did not feel it was relevant that the plaintiff was not a common carrier nor operating 'under the auspices' of a common carrier" is made up out of whole cloth. To the contrary, in distinguishing the situation in *CFNR* from the decision in *Union Stockyard & Transit Co of Chicago v. United States*, 308 U.S. 213 (1939), the magistrate specifically noted that the party seeking a finding of preemption under 49 U.S.C. § 10501(b) was not a rail carrier. At page 3 of the opinion, the magistrate states:

> Moreover, Apex is not a common carrier subject to the ICC, like the railroad in *Union Stockyard.*

Thus, although the magistrate also found other bases for distinguishing *CFNR* from the holding in *Union Stockyard*, the fact that the plaintiff was not a rail carrier was clearly a factor in coming to the conclusion that the challenged activities were not integrally related to rail transportation.

In addition, the holding in *CFNR* was not predicated solely, as Hi Tech now urges, on the fact that one of the plaintiffs there was engaged in trucking operations and that the facility in issue was designed to serve only a single customer. While the magistrate did discuss the trucking aspect of the operations, that is natural since these activities were part of what was being challenged. In that respect, that portion of the *CFNR* decision is identical to the Board's decision in this proceeding served November 20, 2002 ("*Hi Tech I*"). In that decision, the Board rejected Hi Tech's argument that its trucking operations inbound to the solid waste transfer facility were somehow preempted by §10501.

> Hi Tech's attempt to link these activities, as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation will be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction.

Hi Tech I at 3.